Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

EDWARD WAGNER,

Petitioner,

v.

CITY OF WEST PALM BEACH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether complaints to a governmental employer are protected by the First Amendment if not conveyed to the public?

2. Whether complaints about workplace safety in public-sector employment are protected by the First Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

I. SPEECH NEED NOT BE CONVEYED TO THE PUBLIC TO TOUCH ON MATTERS OF PUBLIC CONCERN 4

II. SPEECH CONCERNING WORKPLACE SAFETY IS A MATTER OF PUBLIC CONCERN 9

CONCLUSION 13

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Azzaro v. County of Allegheny, 110 F.3d 968 (3rd Cir. 1997) 5

Brown v. Texas A & M University, 804 F.2d 327 (5th Cir. 1986) 5

Campbell v. Arkansas Dept. Of Correction, 155 F.3d 950 (8th Cir. 1998) 6, 9, 12

Cerracchio v. Alden Leeds, Inc., 223 N.J. 435, 538 A.2d 1292 (1988) 10

Chappel v. Montgomery County Fire Protection Dist. No. 1, 131 F.3d 564 (6th Cir. 1997) 6

Chateaubriand v. Gaspard, 97 F.3d 1218 (9th Cir. 1996) 6

Comm'r of Internal Revenue v. McCoy, 484 U.S. 3 (1987) 1

Connick v. Myers, 461 U.S. 138 (1983) 7

Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996) 5

Deremo v. Watkins, 939 F.2d 908 (11th Cir. 1991) 4

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991) 5

Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996) 4

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 7

Haddle v. Garrison, 119 S.Ct. 489 (1998) 11

TABLE OF AUTHORITIES – Continued

Page

Kulch v. Structural Fibers, 78 Ohio St. 3d 134, 677 N.E.2d 308 (1997).....10, 11

Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979)..... 11

Mings v. Department of Justice, 813 F.2d 384 (Fed. Cir. 1987) 4

Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993) 3

Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977) 7

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993) 5

Pickering v. Board of Education, 391 U.S. 563 (1968) 7

Paradis v. Montrose Memorial Hosp., 157 F.3d 815 (10th Cir. 1998)..... 6

Rankin v. McPherson, 483 U.S. 378 (1987) 8

Reich v. Hoy Shoe Co., 32 F.3d 361 (8th Cir. 1994) 11

Siebert v. Oklahoma, 867 F.2d 591 (10th Cir. 1989) 10

Smith v. U.S., 502 U.S. 1017 (1991) 1

Wales v. Bd. Ed. of Community Unit School Dist. 300, 120 F.3d 82 (7th Cir. 1997)..... 4

Weidler v. Big J. Enterprises, 124 N.M. 591, 953 P.2d 1089 (1997).....10, 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 651(b) 11

42 U.S.C. § 1983 2

42 U.S.C. § 1985(2) 11

MISCELLANEOUS

Annotation, *Liability for Retaliation Against At-Will Employee for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R. 4th 13 (1990) 11

Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 Ohio St. L.J. 341 (1994) 12

PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward Wagner, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit, entered October 29, 1998, affirming summary judgment for the Respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Edmondson, and Cox, JJ.) is unreported.[1] (App., *infra*, 1). The opinion of the United States District Court for the Southern District of Florida (Moreno, J.) is unreported. (App., *infra*, 6).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 29, 1998. The Eleventh Circuit denied Petitioner's timely Petition for Rehearing on December 31, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case." *Comm'r of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987). *See also Smith v. U.S.*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Non-publication must not be a convenient means to prevent review.").

STATEMENT OF THE CASE

Petitioner, Edward Wagner (hereinafter "Wagner"), was a sergeant with the City of West Palm Beach Police Department (hereinafter "the City"). Prior to conveying concerns about workplace safety in a memorandum to his superiors, Wagner was also a member of the City's elite S.W.A.T. Team. Wagner's concerns originated with a newspaper article that described asbestos contamination in vacant buildings in West Palm Beach. Wagner recognized that one of the buildings described in the article as being contaminated was commonly used by the City for S.W.A.T. Team training, and was often searched by patrol officers looking for vagrants. In a private memorandum to his superiors, Wagner duly inquired of the propriety of training in a contaminated building, attached a copy of the article to his complaint, and asked that past exposures be documented in the personnel files of all S.W.A.T. Team members.

Because of this memorandum, the City demoted Wagner from the S.W.A.T. Team. Wagner thereafter brought this § 1983 action against the City and two of its officials[2] based on the First Amendment. The United States District Court for the Southern District of Florida concluded that while Wagner's speech touched on matters of public concern, App., *infra*, 15, it was outweighed by the City's interest in efficient public services. *Id.* It thus granted summary judgment for the City. Because the Eleventh Circuit disagreed with the District Court's

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[2] This Petition refers collectively to all defendants as "the City."

assumption that Wagner's speech involved a matter of public concern, it found it unnecessary to weigh Wagner's and the City's respective interests. App., *infra*, 3. Instead, the Eleventh Circuit found that because Wagner complained privately, he was not protected from retaliation: "In determining whether the employee spoke on behalf of the public or simply as an employee on behalf of himself, the court may consider the employee's attempts to make the concerns public. . . . " App, *infra*, 4 (quoting *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993)). Because Wagner voiced his concerns only to his immediate supervisor, the Team Captain, "and made no effort to communicate the contents of the letter to the public," App., *infra*, 4, the Eleventh Circuit concluded that his speech "does not constitute a matter of public concern." App., *infra*, 5.

The Eleventh Circuit also concluded that because Wagner's speech "did not contend that a large segment of society was at risk, or even that other members of the community, outside the S.W.A.T. Team, faced potential health risks," it could not concern the public at-large. App., *infra*, 4. "At most," the court stated, "Wagner's speech voiced the safety interests of other S.W.A.T. Team members." *Id.* Because Wagner did not complain about public safety in general, but only complained about the safety of public-sector employees, the Eleventh Circuit ruled that his speech was private.

REASONS FOR GRANTING THE PETITION

I. SPEECH NEED NOT BE CONVEYED TO THE PUBLIC TO TOUCH ON MATTERS OF PUBLIC CONCERN.

The lower courts have split over whether a speaker's choice of audience is relevant to First Amendment protection. Some, like the Eleventh Circuit, have held that "while not dispositive, the employee's attempt at public communication is still a relevant factor in the 'public concern' analysis." *Deremo v. Watkins*, 939 F.2d 908, 911 (11th Cir. 1991). The Seventh Circuit likewise has concluded that "[a]lthough the first amendment is not limited to speech that is broadcast to the world, . . . an employee's decision to deliver the message in private supports an inference that the real concern is the employment relation. . . . " *Wales v. Bd. Ed. of Community Unit School Dist. 300*, 120 F.3d 82, 84 (7th Cir. 1997). *See also Mings v. Department of Justice*, 813 F.2d 384, 388 (Fed. Cir. 1987) ("The petitioner's use of internal agency channels . . . buttresses the conclusion that the letter did not address a matter of general public interest.").

Most Circuits, however, have found that whether an employee "goes public" is irrelevant to the "public concern" analysis. The District of Columbia Circuit, for instance, has stated: "The absence of media coverage is of no consequence. Circuit law is clear that 'the fact that [an employee's] statement was not made public does not affect the analysis'. An employee is not constitutionally penalized for making a sensitive report discreetly and without fanfare, or for failing to elicit the media's interest." *Fox v. District of Columbia*, 83 F.3d 1491, 1494 (D.C.

Cir. 1996) (citations omitted) (bracketed material in original). Similarly, the Third Circuit recently stated:

> Private dissemination of information and ideas can be as important to effective self-governance as public speeches. Thus, if the content and circumstances of a private communication are such that the message conveyed would be relevant to the process of self-governance if disseminated to the community, that communication is public concern speech even though it occurred in a private context.

Azzaro v. County of Allegheny, 110 F.3d 968, 978 (3rd Cir. 1997). The First, Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have stated virtually identical rules. *See O'Connor v. Steeves*, 994 F.2d 905, 916 (1st Cir. 1993) ("the decision to disclose his allegations to the Board, rather than the community at large, did not eliminate O'Connor's First Amendment interest in speaking out."); *Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d 775, 780 (2d Cir. 1991) ("The mere fact that a public employee chooses to discuss privately his concerns with his employer as opposed to expressing his views publicly does not alter the analysis."); *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996) ("Nothing in the form (private letter with no member of the Association identified) or context (slipped under the sheriff's door) of the speech deprives it of its public import. Public employees do not forfeit the protection of the Constitution's Free Speech Clause merely because they decide to express their views privately rather than publicly."); *Brown v. Texas A & M University*, 804 F.2d 327, 337 (5th Cir. 1986) ("The fact that the speech was delivered privately to Brown's superiors,

rather than to Bob Woodward and Carl Bernstein, does not necessarily render the speech any less protected. A public employee who engages in whistle blowing does not 'forfeit his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly'."); *Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 579 (6th Cir. 1997) ("Constitutional protection for speech on matters of public concern is not premised on the communication of that speech to the public."); *Campbell v. Arkansas Dept. Of Correction*, 155 F.3d 950, 959 (8th Cir. 1998) ("Contacting the media is not necessary for a public employee's comments to be on matters of public concern, however. Complaints to superiors or private communications with an employer about matters of public concern are also protected under the first amendment."); *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996) ("The form of the speech – complaints to staff and superiors rather than to the general public – does not remove it from the realm of public concern."); *Paradis v. Montrose Memorial Hosp.*, 157 F.3d 815, 818 (10th Cir. 1998) ("We also reject appellants' argument that public employees are not protected by the First Amendment unless they 'go public' with their allegations or bring them to the attention of a directorial board.").

First Amendment retaliation claims turn on a four-part test. First, only speech touching matters of "public concern" is protected; second, the speech must be more important than the state's interest in providing efficient public services; third, the speech must be causally related to the state's adverse employment decision; fourth, the state must not be able to prove that its adverse action

would have been meted out anyway. *See Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977); *Connick v. Myers*, 461 U.S. 138 (1983).

Regarding the threshold question of "public concern," the Court has stated on several occasions that speech need not be made to the media or public-at-large to enjoy First Amendment protection. In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), for example, a teacher (Givhan) was discharged for privately expressing her concerns over school desegregation to her school's principal. "[B]ecause [Givhan] had privately expressed her complaints and opinions to the principal," the school argued, "her expression was not protected under the First Amendment." *Id.* at 413. A unanimous Court (in an opinion by Justice Rehnquist) flatly rejected the school's defense: "Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment." *Id.* at 415-16.

In *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), the Court stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." The Court was clear to point out that "context" does not include the nature of the audience. The question is whether "the [speech], *if released to the public*, would convey no information at all other than the fact that a single employee is upset with the status quo." *Id.* (emphasis added). The Court further

noted that the "right to protest . . . a matter inherently of public concern [ ] is not forfeited by [the] choice of a private forum." *Id.* at 148 n.8. *See also Rankin v. McPherson*, 483 U.S. 378 (1987) (Court finds comment made in private about attempted assassination of President Reagan speech on a matter of public concern).

While the District Court heeded this precedent and assumed that Wagner's memorandum touched on matters of public concern, the Eleventh Circuit ruled as a matter of law that it did not: "Wagner voiced those concerns [about workplace safety] in a letter to the Team Captain. The letter is the only means by which Wagner voiced his concerns; he made no effort to communicate the contents of the letter to the public." App., *infra*, 4. Compounding its error, the Eleventh Circuit ignored the fact that the matter was already public, having been addressed in the local paper. The Eleventh Circuit also disregarded Wagner's sworn statement that "he wrote [the memorandum] for the safety of the SWAT Team and road patrol officers, for the safety of the general public, to save the City extra expense for claims reported to possible asbestos exposure, and for my own personal health and safety." *See* Plaintiff's Affidavit in Response to Defendants' Motion for Summary Judgment, at ¶ 12.

Because the Eleventh Circuit's reliance on the nature of Wagner's audience contradicts the approach taken in a majority of circuits, as well as the clear precedent of this Court, certiorari should be granted to resolve the conflict. *See* Supreme Court Rules 10(a) & (c).

II. SPEECH CONCERNING WORKPLACE SAFETY IS A MATTER OF PUBLIC CONCERN.

The District Court assumed that Wagner's memorandum about workplace safety involved a matter of public concern. App., *infra*, 15. The Eleventh Circuit, in contrast, concluded that because Wagner's memorandum was "primarily in furtherance of his private interests," it could not touch matters of public concern. App., *infra*, 5. "Wagner did not contend that a large segment of society was at risk, or even that other members of the community, outside the S.W.A.T. Team, faced potential health risks." App., *infra*, 4.

The argument that employees' complaints about workplace hazards do not concern the public has been rejected by several courts in different legal contexts. The Eighth Circuit, for example, expressly rejected this argument for First Amendment purposes in *Campbell v. Arkansas Department of Correction*, 155 F.3d 950 (8th Cir. 1998). In *Campbell*, a prison warden (Campbell) was demoted after privately criticizing the safety record of the Arkansas Department of Corrections. In particular, Campbell complained about "unsafe conditions" for his employees and sought "adjustments to cell doors, hazardous pay for his workers, and other measures to improve security" to protect prison guards. *Id.* at 958. The Eighth Circuit rejected the argument that Campbell's speech did not touch on matters of public concern because it involved workplace safety: "Campbell's communications addressed the safety of prison employees and the surrounding community, . . . as well as the overall effectiveness of the prison unit. These are all

matters well beyond the procedural technicalities of prison administration or personnel matters of particular concern to him as an individual." *Id. See also Siebert v. Oklahoma*, 867 F.2d 591, 595 (10th Cir. 1989) (district court concludes that "safety in the workplace is something which could rise to the level of public concern.").

State courts too have recognized that workplace safety is a concern to the general public. Many have thus fashioned exceptions to their states' long-standing discharge-at-will doctrines in order to protect employees who complain. In *Cerracchio v. Alden Leeds, Inc.*, 223 N.J. 435, 538 A.2d 1292 (1988), for instance, the court recognized a claim for wrongful discharge where a private sector employee had been fired for complaining about workplace safety:

> It is clear to us that there is a strong public policy in New Jersey favoring safety in the workplace. . . . In our view, the reporting of unsafe conditions in the workplace by an employee is action in furtherance of this firmly held policy. Concomitantly, retaliation against the reporting employee . . . directly affronts our policy in favor of safety.

Id. at 445, 538 A.2d at 1298. While not specifically addressing the First Amendment, cases like *Cerracchio* demonstrate that workplace safety concerns all Americans and not just those placed at immediate risk. *See also Weidler v. Big J. Enterprises*, 124, N.M. 591, 597, 953 P.2d 1089, 1095 (1997) ("New Mexico thus recognizes an employee's right to institute a private cause of action . . . to enforce his common-law right not to be discharged for reporting unsafe practices in the workplace."); *Kulch*

v. Structural Fibers, 78 Ohio St. 3d 134, 153, 677 N.E.2d 308, 322 (1997) ("Retaliation against employees who file OSHA complaints concerning unsafe or unhealthy conditions in the workplace is an absolute affront to Ohio's public policy favoring workplace safety. Such retaliation clearly contravenes the public policy of this state."). *See generally* Annotation, *Liability for Retaliation Against At-Will Employee for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R. 4th 13, 20 (1990) ("courts have ruled in favor of the employee where the subject of those complaints or efforts affected only the employee or co-workers").

Perhaps more importantly, Congress has expressed a national policy in favor of workplace safety. The purpose behind the Occupational Safety and Health Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To further this policy, Congress "placed great reliance on employee assistance in enforcing the Act." *See Marshall v. Whirlpool Corp.*, 593 F.2d 715, 722 (6th Cir. 1979). Retaliation for reporting dangerous workplace conditions is therefore illegal under federal law.[3] *See, e.g., Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368 (8th Cir. 1994) ("The OSH Act's requirement that employers not retaliate

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[3] This Court held this Term, in a related context, that retaliation in the private-sector workplace against employees testifying before federal grand juries violates federal civil rights laws. *See Haddle v. Garrison*, 119 S.Ct. 489 (1998). The Eleventh Circuit had held that at-will employees were not protected by 42 U.S.C. § 1985(2). This Court disagreed: "The gist of the wrong . . . is . . . intimidation or retaliation against witnesses in federal-court proceedings." 119 S.Ct. at 492.

against complaining employees, like the Act generally, should be read broadly, 'otherwise the Act would be gutted by employer intimidation'.") (citation omitted).[4]

The Occupational Safety and Health Act reflects a national, public commitment to workplace safety. "It is a matter of public concern that we as a country do business in a way that minimizes the risk of physical injury employees face in the workplace." Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 Ohio St. L.J. 341, 381 (1994). Since workplace safety in the private sector is a public concern, the health and safety of public employees – whose salaries are paid by tax dollars – surely must touch the public's interest.

The Eleventh Circuit's conclusion that complaints addressing workplace safety are matters of private concern contradicts the Eighth Circuit's conclusion in *Campbell* and this nation's declared policy in favor of workplace safety. Because of this conflict and the importance of this issue, certiorari should be granted to the United States Court of Appeals for the Eleventh Circuit. *See* Supreme Court Rules 10(a) & (c).

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[4] Note that no private cause of action for retaliation exists under the federal Occupational Safety and Health Act. *See, e.g., Weidler*, 124 N.M. at 597, 953 P.2d at 1095.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5730
Non-Argument Calendar

D. C. Docket No. 95-8533-Cv-FAM

EDWARD WAGNER,

Plaintiff-Appellant,

versus

CITY OF WEST PALM BEACH, a municipal corporation, BILLY RIGGS, in his individual capacity and in his official capacity as Chief of Police, RIC L. BRADSHAW, in his individual capacity and in his official capacity as Assistant Chief of Police,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(October 29, 1998)

Before TJOFLAT, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

Edward Wagner is a sergeant with the City of West Palm Beach Police Department ("Department"). Wagner

sued Assistant Chief of Police Ric Bradshaw and Chief of Police Billy Riggs, in their individual and official capacities, and the City of West Palm Beach, challenging the Department's decision to remove Wagner from the S.W.A.T. Team ("the Team"). Wagner asserted that his removal was a violation of the Americans With Disabilities Act, the Florida Constitution, and the First Amendment.[1] The district court granted summary judgment in favor of the defendants. Wagner appeals the district court's grant of summary judgment on the § 1983 First Amendment claim, which Wagner brought only against Bradshaw.[2] Wagner claims that Bradshaw removed Wagner from the S.W.A.T. Team because Wagner voiced concerns over the Team's safety.

In determining whether an employee has made out a claim for retaliation in violation of the First Amendment, this court has developed a four part test. First, the court must determine the threshold issue of whether the employee's speech constitutes a matter of public concern. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989); *see also Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). The court examines the content, form, and context of the employee's speech to determine whether it addresses a matter of public concern. *See Bryson*, 888 F.2d at 1565 (citations

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[1] Wagner sought a remedy for the First Amendment violation pursuant to 42 U.S.C. § 1983.

[2] It is unclear from Wagner's complaint whether the First Amendment claim was brought against Bradshaw both individually and in his official capacity. We will assume that it was.

omitted). Second, if the speech constitutes a matter of public concern, the court applies the balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), weighing the employee's First Amendment interests against the interest of the employer in providing efficient public services. *Bryson*, 888 F.2d at 1565. Third, if the employee prevails on the balancing test, the fact-finder must determine whether the employee's speech played a substantial role in the employer's adverse employment decision. *Id.* Fourth, if the employee shows that the speech was a substantial motivating factor in the decision, the burden shifts to the employer to prove that it would have reached the same decision in the absence of the protected conduct. *Id.*

As to Wagner's claims for injunctive relief and those against Bradshaw in his official capacity, for which qualified immunity is not available, the district court assumed that Wagner's speech involved a matter of public concern and held that Wagner failed to survive the second prong of the analysis – the *Pickering* balancing test. We agree with the district court that Wagner has failed to make out a claim for retaliation in violation of the First Amendment, but we need not reach the second prong of the analysis.[3] Instead, we hold that Wagner failed to meet the threshold requirement by showing that his speech involved a matter of public concern. "To fall within the

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[3] This court may affirm the district court on any legal ground, regardless of the grounds addressed, adopted, or rejected by the district court. *See Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468, 470 (11th Cir. 1993); *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992).

realm of [ ] 'public concern,' an employee's speech must 'relat[e] to a [ ] matter of political, social, or other concern to the community.' " *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993) (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)). First Amendment protection is not available when the employee speaks upon "matters only of personal interest." *Id.* In determining whether the employee spoke on behalf of the public or simply as an employee on behalf of himself, the court may consider the employee's attempts to make the concerns public along with "the employee's motivation in speaking." *Id.* (citations and internal quotation omitted).

In the instant case, Wagner alleges that the Department's decision to remove him from the S.W.A.T. Team was retaliation for his having voiced concerns that the Team had practiced in a building contaminated by asbestos. Wagner voiced those concerns in a letter to the Team Captain. The letter is the only means by which Wagner voiced his concerns; he made no effort to communicate the contents of the letter to the public. Further, the language used in the letter suggests that Wagner's motivation in speaking was personal; Wagner did not purport to speak on anyone's behalf and " 'in no way dr[ew] the public at large or its concerns into the picture.' " *Id.* at 755 (quoting *Pearson v. Macon Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279 (11th Cir. 1992)) (alternation [sic] in original). At most, Wagner's speech voiced the safety interests of the other S.W.A.T. team members. Wagner did not contend that a large segment of society was at risk, or even that other members of the community, outside the S.W.A.T. Team, faced potential health risks. Because Wagner's

speech was primarily in furtherance of his private interests, it does not constitute a matter of public concern.

As to Wagner's claims against Bradshaw in his individual capacity, the district court held that Bradshaw was entitled to qualified immunity because it was not clearly established at the time of Wagner's speech that it was unconstitutional to remove a S.W.A.T. Team officer for voicing concerns about safety. (R.7-140-8). However, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). In this case, because Wagner's speech does not involve a matter of public concern, it is not protected by the First Amendment. Therefore, because Wagner failed to establish the violation of a constitutional right at all, we need not reach the question of whether any right allegedly violated was "clearly established."

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 95-8533-CIV-MORENO

EDWARD WAGNER,

Plaintiff,

vs.

CITY OF WEST PALM BEACH, a municipal corporation, BILLY RIGGS, in his individual capacity and in his official capacity as Chief of Police, and RIC L. BRADSHAW, in his individual capacity and in his official capacity as Assistant Chief of Police,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 24, 1997)

THE MATTER was referred to the Honorable William C. Turnoff, United States Magistrate Judge, for a Report and Recommendation on Plaintiff's Motion for Summary Judgment (docket no. 96) and Defendant's Motion for Summary Judgment (docket no. 54). The Magistrate Judge filed a Report and Recommendation on March 19, 1997, and recommended that Defendants' motion be granted and Plaintiff's motion be denied. After a *de novo* review of the entire record and the issues that the objections to the Magistrate Judge's Report and Recommendation present, the Court agrees with the conclusions of the

Magistrate Judge and grants summary judgment in favor of the Defendants.

Background

Plaintiff is a sergeant with the City of West Palm Beach Police Department. He brings this action challenging the Department's decision to remove him from the S.W.A.T. Team on the grounds that his removal constitutes a violation of the Americans With Disabilities Act ("ADA"), the First Amendment, and the Florida Constitution.

In June 1988, Plaintiff suffered a neck injury in a duty-related car accident. In October 1989, he was selected to become a member of the City's S.W.A.T. Team. Sometime during the course of his tenure with the S.W.A.T. Team, Plaintiff sent a letter to the S.W.A.T. Team captain voicing his concerns that the S.W.A.T. Team was practicing in a building contaminated by asbestos.

On June 14, 1993, Plaintiff was notified by Defendant Ric L. Bradshaw, the Assistant Chief of Police for the City and Commander of S.W.A.T. operations, that he was being removed from the S.W.A.T. Team. A memorandum to Plaintiff from Bradshaw set forth the reasons for Plaintiff's removal:

> It has come to my attention in recent weeks that you appear to have problems associated with a neck injury and this old injury is causing you difficulty due to a less than violent confrontation. In addition, your memo expressing concern over hazardous environmental situations, in particular, asbestos in buildings, has caused

> me to be concerned about exposing you to violent situations or areas that may have adverse hazardous materials. . . .
>
> SWAT Team operations always have possible violent consequences and are physically demanding; anyone who has an easily injured neck has the potential to do additional damage and may be ineffective and a detriment to other Team members and could hamper an operation and its successful outcome.

Bradshaw further stated in his memorandum that the Plaintiff could reapply for the S.W.A.T. Team when he had corrected his existing health problems.

Shortly thereafter, Plaintiff submitted letters from two physicians to the Chief of Police, Defendant Billy Riggs, stating that Plaintiff was fit to perform unrestricted physical activity, including those activities performed by the S.W.A.T. Team. In March 1994, the Department announced that applications were being accepted for positions on the S.W.A.T. Team. Plaintiff applied but was not chosen for the Team.

Subsequently, Plaintiff asserts that he attempted to file an ADA grievance with the Police Department but was never advised that the Department had a grievance procedure. After filing a complaint with the EEOC, Plaintiff filed this action.

Plaintiff contends that his removal from the S.W.A.T. Team was the result of discrimination based on a perceived disability and in retaliation for his voiced concerns over the Team's safety. Both parties have moved for summary judgment on those claims. A hearing was held

before the undersigned at which oral argument was heard.

Legal Analysis

1. ADA Claim

Plaintiff attempts to state a claim under the ADA on the grounds that he was denied a position on the S.W.A.T. Team because Defendants perceived him as having a disability. "As with real impairments, courts have held that a perceived impairment must be substantially limiting and significant." *Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 912 (11th Cir. 1996). The ADA regulations include "working" as a "major life activity" which, if substantially limited or regarded as substantially limited by an impairment, would qualify a person as disabled within the meaning of the ADA. 29 C.F.R. § 1630.2(i). "However, 'working' does not mean working at a particular job of that person's choice." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (citations omitted). "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Id.* (quoting *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994)).

Here, the Magistrate Judge correctly concluded that, even viewing all of the evidence in the light most favorable to the Plaintiff, it is clear that the Defendants viewed Plaintiff's perceived impairment as limiting only his ability to be a member of the S.W.A.T. Team. Plaintiff was allowed to remain with the Police Department as an officer. In that capacity, he may be subjected to duties as dangerous or more dangerous than those of the S.W.A.T.

Team. Indeed, there is evidence that Plaintiff has excelled at this position and is next in line for promotion to Lieutenant. Clearly, the Plaintiff cannot plausibly claim that the Defendants perceived him as having a "substantially limiting" impairment, and summary judgment on Plaintiff's ADA claims in favor of the Defendants is appropriate.

Plaintiff contends that adopting the conclusion of the Magistrate Judge would effectively "stand the [ADA] on its head" because as long as the plaintiff can perform some job, he could never recover for a discriminatory adverse employment decision. The Court disagrees. The Magistrate Judge's holding does not adopt a per se rule prohibiting ADA coverage for anyone who retains the ability to do some type of work. Rather, the conclusion that this Court adopts is in keeping with the legion of case law holding that a plaintiff is not disabled under the Act simply because he cannot perform a narrow range of jobs; the Court must instead look to plaintiff's ability to perform the larger class of jobs at issue. *See, e.g., McKay v. Toyota Motor Mfr.*, 110 F.3d 369, 373 (6th Cir. 1997) ("[W]e hold that the physical restrictions caused by plaintiff's disability do not significantly restrict her ability to perform the class of jobs at issue, manufacturing jobs; at best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs. . . . "); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995) (Arm impairment did not prevent plaintiff from working in the entire class of welding jobs, only those requiring substantial climbing.); *Webb v. Garelick Mfr. Co.*, 94 F.3d 484 (8th

Cir. 1996) (An individual is disabled when her impairment prevents performance of a *"certain class of jobs."*) (emphasis added); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (Postal employees suffering from disability that prevented him from working at a letter sorting machine was not handicapped because he could still carry out other duties at the post office.). Even defining the class of jobs at issue here as narrowly as that of "law enforcement officers," it is plain that Defendants did not consider Plaintiff's impairment to interfere with his ability to perform. To limit the class of job as drastically as the Plaintiff suggests to "S.W.A.T. Team officers" would indeed stand the ADA on its head and blatantly ignore the settled principle that the ability to work "does not mean working at a particular job of that person's choice." *Wooten v. Farmland Foods*, 58 F.3d at 385 (8th Cir. 1995).

2. Failure to provide adequate grievance policy

Plaintiff also contends that the Defendants have discriminated against persons with disabilities by not providing adequate grievance procedures within the City's Police Department in violation of 28 C.F.R. §§ 35.105, 35.106, 35.107. These regulations require the City to maintain a self-evaluation plan and a grievance procedure pursuant to the ADA.

Defendants offered evidence that they have had in place such procedures since 1994. Plaintiff does not dispute that such procedures are in place now, but contends that the City failed to establish such policies within the

deadline established by the Department of Justice. Plaintiff argues that had such policies been timely implemented, his supervisors would have been aware of the ADA and would have been more knowledgeable in making their employment decisions.

The Court agrees with the Magistrate Judge that the Plaintiff lacks standing to bring this claim. There is no evidence that Plaintiff's injuries are fairly traceable to the City's tardiness in complying with the regulations. Plaintiff's arguments that the timely compliance with the ADA regulations would have prevented his injury are based only on speculation. In such circumstances, Plaintiff does not have standing to raise this claim. *See Allen v. Wright,* 468 U.S. 737, 751 (1984); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

3. First Amendment Claim

The Court further agrees with the Magistrate Judge that Plaintiff's First Amendment claim must fail as a matter of law because Defendant Bradshaw is entitled to qualified immunity. Under the doctrine of qualified immunity, a public official performing a discretionary function enjoys qualified immunity provided that his conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Only in exceptional cases should such knowledge can [sic] be imputed. *Lassiter v. Alabama A & M Univ.,* 28 F.3d 1146 (11th Cir. 1994).

The question for the Court then is clear: whether it clearly established in June 1993 that it was unconstitutional for the Assistant Chief of Police to remove a S.W.A.T. Team officer because of the officer's voiced concerns about safety. In answering this question, the Court is mindful of the Eleventh Circuit's instructions:

> The Supreme Court has never established a bright-line standard for determining when the State as an employer may take action adverse to an employee in response to that employee's speech. Instead, the Court has balanced the interest of the employee in commenting on matters of public concern against the interest of the employer in performing public services efficiently. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1986). . . . Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where [the] *Pickering* balancing [test] would lead to the inevitable conclusion that the [adverse employment action] was unlawful.

Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989). When the employer is a quasi-military organization such as the Police Department, the scales tip even more pronouncedly in favor of the employer. *Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir. 1994).

Considering these principles, the Court must conclude that pre-existing law did not clearly establish that Bradshaw would have necessarily known that his actions violated plaintiff's First Amendment rights. Plaintiff's concern with the health and welfare of the S.W.A.T. Team

members is certainly a laudable one. However, the Defendant's interest in maintaining the loyalty, discipline, morale, and preparedness of the S.W.A.T. Team are equally valid. In such a case, the Court cannot conclude that the *Pickering* balancing test leads to the inevitable conclusion that Defendant Bradshaw's actions were unlawful, and Defendant Bradshaw is therefore entitled to qualified immunity.

Plaintiff's First Amendment claims for injunctive relief, however, require the Court to engage in a more detailed *Pickering* analysis, because the "qualified immunity defense has no application to . . . attempts to gain injunctive relief." *Lassiter*, 28 F.3d at 1149 n.2. The Magistrate Judge failed to address this issue in his Report and Recommendation, but the Plaintiff has raised it in his objections. Thus, the Court must determine whether the Plaintiff has made out a claim for retaliation in violation of the First Amendment.

The Eleventh Circuit has developed a four-part test for making such an evaluation. First, a court must determine whether the government employee's speech is a matter of public concern. *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993). If so, the district court must weigh the employee's first amendment interest against the interest of the employer in providing efficient public services under the *Pickering* balancing test. *Id.* Should the employee prevail on the balancing test, the fact-finder must determine whether the employee's speech played a substantial role in the employer's adverse employment decision. *Id.* Finally, if the employee shows that the speech was a substantial motivating factor in the decision, the employer may prove by a preponderance of the

evidence that it would have reached the same decision even in the absence of the protected conduct. *Id.*

Even assuming that the speech involved here involves a matter of public concern, the Plaintiff fails to survive the second prong of the analysis. As noted above, in engaging in the *Pickering* balancing, the Court is conscious of the quasi-military nature of the police department; the fact that the police unit here was the S.W.A.T. Team further weighs in favor of the employer. As an elite unit facing especially dangerous duty, the S.W.A.T. Team's need to maintain high morale, discipline, loyalty, training, and preparedness is critical. Any threat to those goals is cause for alarm. Weighed against those interests, the Plaintiff's free speech interest seems relatively insignificant. Plaintiff was not contending, after all, that a large segment of society was at risk from asbestos contamination, only that the individual members of the S.W.A.T. Team faced such exposure. Considering that all of the S.W.A.T. Team members had volunteered for dangerous duty by applying for the S.W.A.T. Team in the first place and could leave the Team at any time, the asbestos threat against which the Plaintiff was speaking out was minor. In short, the Court concludes as a matter of law that Defendants' interest in promoting the efficient functioning of the West Palm Beach Police Department's S.W.A.T. Team outweighs the Plaintiff's First Amendment interest in speaking out against the risk of asbestos contamination in S.W.A.T. Team training facilities. Accordingly, Plaintiff has failed to state a claim for retaliation.

4. Florida Constitutional Claims

Because the Court has granted summary final judgment in favor the Defendants as to all of Plaintiff's federal claims, it declines to exercise supplemental jurisdiction over Plaintiff's remaining state claim. Therefore, Count V of Plaintiff's Complaint is also dismissed.

CONCLUSION

For the reasons stated above, it is

ADJUDGED that United States Magistrate Judge William C. Turnoff's Report and Recommendation is ADOPTED. Therefore, it is

ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's motion for summary judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of September, 1997.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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